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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CALVIN PRENTICE ROGERS, Defendant and Appellant.	H028671 (Santa Clara County Super. Ct. No. CC451348)

Defendant Calvin Prentice Rogers was convicted after a nonjury trial of two counts of robbery. On appeal he contends that one of the charges is not supported by substantial evidence, that the court erred in taking defendant's waiver of jury trial and in failing to grant relief from that waiver, and that error occurred in sentencing. We find no error, and affirm.

BACKGROUND

Defendant was charged with two robberies: one on April 10, 2004, in Milpitas, and the other a week later in Sunnyvale. The prosecution was also permitted to present evidence of five other robberies, all committed in Alameda County, on the basis that the manner and circumstances of their commission so resembled the charged offenses that the uncharged robberies were admissible to prove the identity of the perpetrator of the

charged offenses. We will therefore recite the evidence concerning all seven robberies, along with other relevant facts, in chronological sequence.

On November 12, 1999, a customer emerged from a Bank of America in Dublin, where she had just made a deposit. On her way to her car she saw defendant talking on the phone. As she sat in her car talking on a cellphone, she saw another customer, a young woman, approaching the bank with a deposit pouch in her hands. The first customer looked down, and when she looked back up she saw defendant running with the deposit pouch in his hands. She followed him in her car as he entered a car and attempted to drive away. While he waited for traffic to clear, she called 911 and read defendant's license number to authorities. She identified him in a subsequent photographic lineup. At the instant trial she again identified him as the robber. Defendant was convicted of robbery in connection with those events.

On February 17, 2004, Carolyn Vane was robbed at a Bank of America branch in Castro Valley. She had driven to the bank in late morning to make a deposit for her employer, a pet supply store. She was carrying two Bank of America deposit pouches, one gray and one navy blue, both with "Bank of America" on them. They contained over $3,000 in cash and a larger sum in checks. She parked her car in the bank's parking lot and approached the entrance. A man ahead of her stopped at the door, as if to open it for her. Instead he turned, grabbed her, wrested the deposit bags from her grip, and ran across the street into the parking lot of a nearby parking mall. She followed, screaming "stop, thief" at the top of her lungs. He was African American, around six feet tall, over 200 pounds, and broad shouldered. A Department of Motor Vehicles printout admitted into evidence without objection stated that defendant is 5 feet 11 inches tall, weighs 220 pounds, and was born on September 6, 1964, making him 39 years old at the time of this robbery. Ms. Vane identified defendant as the robber at the preliminary hearing and at trial. She had failed to select anyone from a photographic lineup about two months after the robbery, but she testified that defendant's photograph was not a good likeness.

On March 5, 2004, shortly after 1:00 p.m., Catherine Travis was robbed at a Bank of America branch on Mission Boulevard in Hayward, where she had gone on behalf of her employer, a cemetery, to deposit over $40,000, of which $3,000 to $4,000 was cash. She carried the money in a zippered Bank of America deposit bag, dark blue with the bank logo in red on the front. As she got out of her car she noticed a man who seemed to be approaching the bank from a nearby drugstore. When she got about 10 feet from the bank, she heard somebody running behind her. Before she had a chance to turn around, the man she had seen came in front of her, grabbed the bag from under her left arm, and ran away. She ran after him and got a further look at him, coming within three feet when he dropped his cell phone. He was black. She described his height as "probably about five-six, five-seven, five-eight." She is five-two, and acknowledged that the robber was taller than she. She could not estimate his weight. She identified defendant as the robber at the preliminary hearing and at trial.

Shortly after 9:20 a.m. on March 12, 2004, Suman Goyal was robbed at a Bank of America Branch on Decoto Road in Union City while attempting to deposit about $12,000 in cash from her family's gas station. She was carrying the cash in a white cloth bag provided by the bank. As she tried to open the door into the bank, somebody came up behind her and snatched the bag from her hands. The robber was black, 30-40 years of age, maybe six feet tall, with a heavy build. She estimated his weight at 150-160, but then said it was "maybe more than that" and affirmed that the robber "was a heavy built person." She described him as "bald headed, no hair on head, and chubby face." After he snatched the bag away, she screamed and screamed. She tried to follow him, but he ran completely out of the parking lot and across the street, at which she stopped.

At the same time, Jason Mandawe was driving to work when he heard a woman screaming in the vicinity of a bank on Decoto Road. He saw a man run across the street, stop at the median island, then continue across the street. He described the man as a light-skinned African American, although he might have told police he was Puerto Rican.

The witness turned into a parking lot on the chance that he might "see someone run into a car." After driving a short distance he saw a man resembling the one he saw crossing the street, driving a small sports car that looked like an RX7 but wasn't. He thought he told police it "looked like a Miata, a RX7." It was a dark green 2-door with a tan top, perhaps a convertible. It had no front plate, but the witness succeeded in getting the first four digits from the rear plate: "4XCX." He followed the car trying to get the rest of the number, but the suspect soon eluded him. Defendant's wife owned a green Mazda Miata with license 4XCX388.[1]

On April 1, 2004, at around noon, Paulette Tran was robbed of about $1,500 which she was attempting to deposit for her employer at a Bank of America in Fremont. The money was contained in a grey Bank of America bag, a little bigger than an envelope, with a zipper and the Bank's symbol. She had walked to the bank from her

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[1] On November 24, 2003, defendant received a traffic ticket while driving a green two-door Mazda with license number 4XCX388. Called and examined by the prosecution, defendant's wife testified, among other things, that she had owned a green 1999 Mazda Miata. Later the prosecutor asked the court to strike all of her testimony on the ground that it had been improperly elicited because the witness had not been given an opportunity to exercise her privilege not to testify against her husband. (Evid. Code, § 970.) The court granted the request, but we note that defense counsel had also subpoenaed Ms. Rogers with the intention of having her establish an alibi testimony for defendant. After her examination by the prosecution, defense counsel in fact made her his witness and examined her toward that end. By its terms the statute did not entitle her to refuse to testify *in her husband's favor*. (Evid. Code, § 970, italics added [married person "has a privilege not to testify *against his spouse* in any proceeding"]; see 2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 176, p. 447.) Once she did so, the privilege not to testify dropped away entirely. (Evid. Code, § 973, subd. (a) ["Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party . . . does not have a privilege under this article in the proceeding in which such testimony is given"].) It thus appears that the only defect in the proceeding was that the prosecution called Ms. Rogers before the defense did so. It is far from clear that this justified striking her initial testimony; surely it would not have prevented the prosecution from recalling her to recapitulate that testimony *after* she testified for her husband.

place of employment on the opposite side of a parking lot. About 10 feet from the bank she heard a voice behind her saying hey or something. As she turned around, the robber snatched the bag. He was an African American man, in his late 20s or so, weighing "like 200 pounds or something." He ran off and she ran after him. She followed him down some stairs, through a court, to a street where he got into a parked Honda Accord, maroon, from the late 80s or early 90s. Halfway through this chase he dropped the deposit bag and had to turn back for it, giving her a second look at his face. She saw his license number, which she repeated to herself for about 30 seconds until she could write it down on her hand. A few minutes later she called 911 and gave them the number, 2VXU317. Two weeks later she viewed a photographic lineup from which she "[i]mmediately" identified defendant as the robber. She also identified defendant as the robber at the preliminary hearing and at trial. The license number she gave in her 911 call number was assigned to a black Honda Accord registered to defendant.

The first of the two charged offenses occurred on on April 10, 2004, when Maria Larios was robbed at a Bank of America branch on Calaveras in Milpitas. She had gone to the bank with two coworkers, Yahayra Cruz and Christopher Olague-Garcia, to make a deposit for the pizza parlor where they worked. They got to the bank around 10:40 in the morning. The three of them approached the bank, Ms. Larios carrying a blue Bank of America deposit bag containing about $2,000. A young African American man was standing near the door talking on a cell phone. As Mr. Olague-Garcia held the door for Ms. Larios, the man stepped in front of her, touched her neck, grabbed the deposit bag, and started running. Mr. Olague-Garcia chased him but Ms. Larios called him back lest something happen to him. As discussed more fully in part I, *post*, none of the three witnesses identified defendant as the robber.

The second charged offense arose from the robbery of Hendrika Dalhuisen on April 17, 2004, at a Bank of America on North Mathilda in Sunnyvale. She had driven there around 10:00 a.m. to deposit about $6,800 in checks and $4,500 in cash for her

employer, a tennis club. She carried the deposit in a light grey zippered pouch with a bank emblem. As she walked toward the bank she saw an African American youth selling candy near the entrance, and an African American man standing next to him. The man saw her coming and walked towards her. She had been holding the deposit in her left hand, but began transferring it to her right when she noticed that the man was going to pass on her left. While she still had both hands on it, the man grabbed it. She held on and started yelling for help, but he won the ensuing tug of war when she let go with one hand to try to punch him. He ran off towards the back of the bank parking lot. She followed. She didn't really get a look at the robber's face. She estimated his age at "around 30, past 30." She estimated his weight at "maybe 180." With memory refreshed, she agrees that she did tell police he weighed 200-225. She estimated his height at "about six feet." She did not think she could identify him.

Josiah Greer, who was 14 years old at the time of trial, testified that he was selling candy in front the Sunnyvale Bank of America on April 17, 2004, when a man approached him and engaged in a brief conversation. The man started walking away, but reversed tracks and resumed the conversation. Then he turned around and starting grabbing at a bag in the hands of a passing lady. After a scuffle, the man grabbed the bag and ran. Josiah testified that if he saw the robber again, he would be able to identify him. He had previously identified defendant as the robber in a photographic lineup. He also identified defendant as the robber at trial.

Hector Plascencia testified that he was using an ATM in front of the Sunnyvale Bank of America when he heard a scream and turned to witness a struggle near the front entrance to the bank between an older woman and a man. The man seemed to be "trying to pry something off of her shoulder that she was holding onto." When he started running, Mr. Plascencia chased him. He saw the fugitive cross the parking lot, jump over a wall, run around a building, and get into a four door black Honda Accord. He also reached the car and bent the car's license plate toward him for a better look, repeating the

number to himself. The number he gave police was 4XVU314. He told them he was confused as to the first digit, which could be a 3. Records of the Department of Motor Vehicles, admitted in evidence, showed that there was no record on file for plate number 4VXU314, that 3VXU314 is registered to a Trung Tran, and that 2VXU317, as noted above, is assigned to defendant's black Honda Accord.

Mr. Plascencia also saw the robber's face. He identified defendant as the robber in a photographic lineup and again at trial.

Defendant was charged by information with two counts of robbery. Two prior strike convictions were charged under Penal Code sections 667, subdivisions (b) through (i) and 1170.12; two prior convictions were charged under Penal Code section 667, subdivision (a); one prior conviction was charged under Penal Code section 667.5, subdivision (a); and five prior convictions were charged under Penal Code section 667.5, subdivision (b). After certain delays caused by the prosecutor's disqualification of one judge and by questions about defendant's competency to stand trial, the matter came on for jury trial, but was continued when defendant waived a jury under circumstances described more fully in part II, *post*. In the continued trial the court found defendant guilty on both counts and sustained all allegations of prior convictions. It denied defendant's motion to dismiss one or both of the strike priors and sentenced him to two consecutive terms of 25 years to life, plus a determinate term of 25 years, for a total sentence of 50 years to life consecutive to 25 years.

This timely appeal followed.

I. *Sufficiency of Evidence of Milpitas Robbery*

Defendant contends that the evidence at trial was constitutionally insufficient to support a finding beyond a reasonable doubt that he was guilty of the charge in count 1, which was the robbery of Maria Larios on April 10, 2004, at the Bank of America in Milpitas. Quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319, he implicitly contends that this is a case in which no "rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." Quoting *People v. Johnson* (1980) 26 Cal.3d 557, 577, 578, he insists that we may not confine ourselves to "isolated bits of evidence" supporting the trial court's findings but must examine "the whole record—i.e., the entire picture of the defendant put before the jury . . . ." Once we do so, he insists, we must conclude that the evidence supporting defendant's conviction on count 1 was not "substantial."

As defendant correctly notes, the case against him on count 1 was far from open-and-shut, mainly because there was no direct evidence identifying him as the robber, and some evidence tending to show, if credited, that he was *not* the robber. The victim, Maria Larios, testified that the robber was a young Afro American man, between 20 and 30 years old, wearing a white sweater, Levi pants, and what she initially described as "a red beanie with a white letter." She could not estimate his height or weight. She testified that if she saw the robber again, she would try to identify him, but was not sure she could. Asked whether she saw the man who robbed her in court, she testified, "No, it's not him." However, she also testified that a red Montreal Expos baseball cap taken from defendant's residence looked like the hat the robber wore.

Yahayra Cruz testified that the robber wore blue jeans, a white sweatshirt, and a red hat with the letter M or N. The hat in evidence looked more or less like robber's hat, she said; on a scale of 1 to 10, her certainty was about 8 that the exhibit looked like the robber's hat. She thought the lettering was "not exactly" like that what she remembered, but she did remember that the lettering was white and blue, as was the lettering on the hat in evidence. She testified that if she saw the robber again, she would not "exactly" be able to identify him.

Christopher Olague-Garcia testified that the robber was probably 5 feet 10 inches to 6 feet 2 inches tall, African American, with light skin and "a big lower lip." Mr. Olague-Garcia saw the robber's face but didn't remember it. He thought he would be able to identify the robber if he saw him again. He did not see the robber in

courtroom. The robber was wearing a red hat with the letter M. It was a fitted cap, not adjustable. It resembled the hat in evidence in this respect and in color. However, the hat in evidence had a bumpy texture and the robber's hat was smooth. In his opinion, the hat in evidence was not the robber's hat.

The prosecutor properly conceded in his argument below that the evidence just recited, standing alone, would not be sufficient by itself to support a finding beyond a reasonable doubt that defendant was the robber. None of the three eyewitnesses identified defendant as the perpetrator, and two of them could be understood to testify that he was *not* the perpetrator. All three of them thought defendant's Montreal Expos cap resembled the headgear worn by the robber, but one of them thought it was not the same hat. Standing alone, this testimony simply would not permit a rational factfinder to determine that defendant was the robber.

The evidence did not, however, stand alone. The robbery was also surrounded by a tapestry of circumstantial evidence that strongly pointed to defendant as the robber. Counting Milpitas, the court heard evidence of seven robberies, one resulting in defendant's conviction five years earlier and six within a two-month period beginning February 17, 2004. In each of the robberies but Milpitas, defendant was identified as the perpetrator by eyewitness identification, links to defendant's or his wife's car, or both. All of the robberies were perpetrated against female victims approaching a bank bearing a deposit bag. All of the robberies took place at branches of the same bank—a bank that apparently issued distinctively colored and marked deposit bags to its business account holders. All but two of the deposit bags bore these distinctive marks and colors, minimizing any doubt about their contents. All of the robberies were committed in the morning or early afternoon.

In four of the robberies, including Milpitas, the robber positioned himself near the bank entrance and engaged in some seemingly innocuous activity for the evident purpose of putting his target at ease. In one case (the last), he feigned interest in buying candy

from a youthful vendor near the entrance. In two others, including Milpitas, he appeared to be talking on the phone until he suddenly grabbed the deposit bag from the victim. Two of the robberies, including Milpitas, were committed right at the bank door. In all of the robberies but the first, the robber escaped the immediate vicinity of the robbery by running, not driving. This fact could be reasonably viewed as be a response to the one exception, Dublin, where defendant was apparently captured and convicted precisely *because* he had parked his getaway car at the scene of the crime, enabling a third party to phone in his license number while he was stuck in traffic.

Further, as the trial court observed, the locations of the robberies made up a distinctive geographic pattern centering on defendant's Fremont home. The prosecutor described the pattern as spokes of a wheel, but it would be more accurate to describe it as an angular S or mirror-image Z. The 1999 Dublin robbery marks the right end of the upper arm; almost due west of this point, the first of the 2004 robberies, Castro Valley, marks the northern point of a nearly straight line running south-southeast to the penultimate robbery in Milpitas, where the pattern turns sharply west to Sunnyvale, completing the figure. Defendant's home sat in the middle of the main, diagonal leg, between the Union City robbery and the Fremont robbery. The Milpitas robbery, which is the subject of defendant's evidentiary challenge, falls squarely within this pattern, and indeed provides the pivot point linking the preceding robberies to the final robbery in Sunnyvale. It bears emphasis that these locations do not simply mark a geometric figure, but one that was drawn, as it were, in chronological sequence, beginning at the top and proceeding to the bottom, like a pen on paper.

Defendant cites cases to the effect that the commission of other similar offenses can only establish the identity of the perpetrator of a charged offense if the similarities are " 'so unusual and distinctive as to be like a signature.' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403, quoting 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803; see *People v. Bean* (1988) 46 Cal.3d 919, 937.) Defendant does not dispute that the

crimes here satisfied this test for purposes of admissibility under Evidence Code section 1101. Instead he seems to contend that the common features of the crimes are not distinctive enough to counterbalance *the failure of the Milpitas eyewitnesses* to identify him as the robber. But we are aware of no categorical rule that requires acquittal when the eyewitnesses to a crime testify that the defendant does not match their memory of the perpetrator. Where other evidence strongly supports an inference that the defendant is the culprit, the failure of eyewitnesses to recognize him is simply a factor for the trier of fact to weigh. After all, " 'the vagaries of eyewitness identification are well known . . . .' " (*People v. McDonald* (1984) 37 Cal.3d 351, 363, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914, quoting *United States v. Wade* (1967) 388 U.S. 218, 228; see CALJIC No. 2.92.)

The trial judge, sitting as trier of fact, was entitled to conclude that the eyewitnesses were simply in error in view of the facts inculpating defendant, i.e., that someone closely resembling him, and wearing a distinctive hat similar to his, committed a robbery using his distinctive methods, and chose to do so at a time and place fitting perfectly in a sequence of similar robberies perpetrated by him.

Nor was the court obliged to take the testimony of the eyewitnesses here at face value. Two of them testified implausibly that the robber delivered a paralyzing "pinch" to the victim. (See discussion, *post*.) The third, Mr. Olague-Garcia, conceded early in his testimony that he saw the robber's face, but did not remember it. His opinion that the baseball cap in evidence was not the cap worn by the robber could also be rationally viewed as a product or misperception or misrecollection. He did not testify that he remembered a distinctive feature that was missing from the cap in evidence. Rather he noticed a feature in the latter—a bumpy texture—that he had not seen in the robber's hat. A factfinder could rationally conclude that he overlooked this apparently subtle feature in the heat of the moment, notwithstanding his testimony that he was concentrating on the robber's headgear as the most visible element of his appearance. The chase, after all, was

brief, ending when Ms. Larios called to Mr. Olague-Garcia to desist for his own protection.

Defendant points to two "very significant differences" that he contends "distinguish the Milpitas case" from the other six robberies in evidence. The first is that "the female victim was alone in every other case while in Milpitas she was with two other people . . . ." It is true that none of the other victims was shown to be accompanied by other people while approaching the bank. However it cannot be said that all of the other victims were truly "alone." The 1999 Dublin robbery was witnessed by another bank customer while sitting in her car, apparently in the bank's parking lot. More tellingly, the Sunnyvale robbery, which occurred one week after Milpitas, was perpetrated in the plain view of both Josiah Greer, who was selling candy 10 feet away, and Hector Plascencia, who was using an ATM 20 feet away. Whether this reflected growing carelessness, increased desperation, or declining luck on defendant's part, it clearly demonstrated that he would not be deterred by the mere presence of third parties.

Defendant's second "very significant difference[]" is that the Milpitas robber "pinched Larios to get the bag away, an act that was unlike anything that occurred in any other robbery." This testimony was indeed unique, but it was also somewhat difficult to credit. The victim, Ms. Larios, testified that as her coworker opened the door, defendant stepped in front of her and stopped her, whereupon "I felt something weird, like my legs got paralyzed. I was totally paralyzed. I couldn't move. That's when he grabbed the envelope and ran away." This feeling of paralysis was associated with a "stabbing" sensation to the left side of her neck. It felt like the robber "punched [her] with a needle or something very sharp, . . . but [she] didn't have any marks or anything." She also described it as a "pinch" that seemingly rendered her unable to move. One of her coworkers, Ms. Cruz, testified that she also saw the robber "pinch" Ms. Larios, who did not shout out in pain, but "was just paralyzed for that moment." The other, Mr. Olague-Garcia, testified that he saw the robber "doing something" with his right hand while

reaching for the deposit bag with his left. He believed the robber "must have touched her like probably in the neck or shoulder or something . . . ."

According to defendant, this testimony establishes that the Milpitas robber used "more force than occurred in any of the other crimes." A factfinder might have reached that conclusion if it believed that the robber in fact applied some kind of immobilizing "pinch" to the victim. However, a rational factfinder would not be obliged to credit this testimony. We are aware of no real-world technique for temporarily "paralyzing" a person merely by pinching, or even punching or hitting, her neck. To the extent one of the victim's coworkers corroborated this supposed event, a factfinder could reasonably infer that their accounts had infected one another by way of the conversations they would naturally be expected to have about the robbery. A factfinder could quite reasonably infer that the "force" witnessed by them consisted at most of holding the victim at the neck while relieving her of the deposit bag. This would resemble the testimony of Castro Valley victim Carolyn Vane that defendant grabbed her shirt with one hand, incidentally ripping off her employee badge. She believed he was holding her with that hand so she wouldn't fall, while he grabbed the deposit bag with his other hand. A factfinder could quite reasonably determine that the Milpitas robbery involved no more force than this.

Defendant also asserts that, in contrast to the other victims, the Milpitas victim "was accosted as she entered the bank doors rather than on the approach to the doors . . . ." But several other victims were robbed while opening, or on the verge of opening, the bank doors. Suman Goyal, the victim of the Union City robbery, testified, "As soon as I go in the bank, I tried to open the door, one person came from behind and snatched the bag and ran away." Carolyn Vane, the Castro Valley victim, testified that defendant walked immediately ahead of her to the door, where he stopped as if to open it for her, then turned, grabbed her, and snatched the deposit bags. Paulette Tran, the Fremont victim, was "[a]bout 10 feet from the bank" when defendant ran up and grabbed her deposit. The fact that the Milpitas victim was actually stepping through the door,

instead of approaching it, suggests an accident of timing, not a distinguishing characteristic in the method of commission.

Defendant states that in Milpitas, "unlike in the other cases, no one saw the perpetrator . . . get into a car, but only saw him run off on foot." On the contrary, two other robberies resembled Milpitas in this respect. Carolyn Vane (Castro Valley) only saw the robber run out of the bank's parking lot, "into the next parking lot and beyond that to the street, and that's where I lost sight of him." Catherine Travis (Hayward) "chased him a little way but I knew I couldn't catch him so I just wanted to remember what he was wearing so I could tell the police." In neither of those cases did anyone testify that defendant was seen getting into a car. Indeed, of the seven victims, only Paulette Tran (Fremont) managed to chase the robber far enough to see him get into a car. In every other case where a car was seen, it was seen by a third party who chased the robber after witnessing the robbery or hearing a hue and cry by the victim. In any event, the point urged by defendant is largely or entirely irrelevant. It does not suggest a distinction in the mode of commission of the Milpitas robbery but at most reflects a logical consequence of the absence of a witness who saw the robber complete his getaway.

We agree with defendant that a witness's affirmative testimony that a defendant is not the perpetrator of a charged offense must be taken seriously in assessing the sufficiency of the evidence to support a convictoin. It is not, however, conclusive, and it does not prohibit a factfinder from determining beyond a reasonable doubt that the defendant is indeed the perpetrator. Here it would have required an astonishing, Ripley's-Believe-It-Or-Not series of coincidences for defendant not to have been the Milpitas robber. Another person would have had to appear who looked like defendant, had a hat like his, used his distinctive method to commit the robbery, and chose a time and location fitting perfectly into the pattern of defendant's other offenses. While the

court would certainly have been entitled to entertain a reasonable doubt about defendant's guilt, it was not obligated to do so.

II. *Jury Trial*

A. Waiver

Defendant contends that the court erred in conducting a nonjury trial because (1) defendant was inadequately informed of the rights he relinquished by waiving a jury, and (2) the court later failed to inquire adequately into defendant's reasons for seeking to be relieved of that waiver. Neither contention can be sustained.

The right to a jury trial in criminal cases is guaranteed by both the federal and state Constitutions. (U. S. Const., 6th & 14th Amends.; *Duncan v. Louisiana* (1968) 391 U.S. 145, 148-150, 155-156; Cal. Const., art. I, § 16.) It is recognized as a "fundamental" constitutional right. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282.) A defendant may waive the right, but for the waiver to be effective there must be he "evidence in the record that the decision to do so was knowing, intelligent, and voluntary." (*People v. Collins* (2001) 26 Cal.4th 297, 305, fn. 2, italics added (*Collins*).) It must appear that the waiver was " ' " 'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it,' " ' " and " ' " 'was the product of a free and deliberate choice rather than intimidation, coercion, or deception.' " ' " (*Id.* at p. 301.)

Defendant does not suggest that his waiver of jury trial was coerced or otherwise involuntary. Rather he argues that he did not act knowingly and intelligently because he was not told that any verdict must be *unanimous*. In *People v. Tijerina* (1969) 1 Cal.3d 41 (*Tierina*)—a case not cited by either party—the California Supreme Court appears to have resolved this issue adversely to defendant. The defendant there "assert[ed] that his waiver of the right to a jury trial was ineffective" in that "he was not told that a jury's verdict must be unanimous." (*Id.* at p. 45.) The court rejected this contention, noting that the defendant was represented by counsel, that he was "carefully questioned" before his

jury waiver was accepted, that he said he knew what a jury trial was, and that "he was also told that 'That is when twelve people sit over here in the box and hear all the evidence.' " (*Id.* at pp. 45-46.) Given these circumstances, the court concluded, the trial court "was not required to explain further to defendant the significance of his waiver of a jury trial." (*Id.* at p. 46.)

We can detect no significant difference between the proceedings held sufficient in *Tijerina* and those under scrutiny here. Directly addressing defendant, the court below said, "You, sir, understand that as to every single charge against you, as to every single prior which has been alleged as an enhancement in your case, and as to all of the factors the Court considers in sentencing you, if a Court were to sentence you[,] to the upper or maximum term, you are entitled to have a trial by a jury of twelve citizens listen to the evidence and determine if your guilt has been proven beyond a reasonable doubt. And they must make specific findings as to the truth of any allegation of a prior or any factor that might be considered in imposing the upper term in your case. Do you understand all of that? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And having those things in mind, do you now wish to give up your right to have those issues tried by the jury and instead to have them tried directly by a judge or court as the trier of fact? [¶] THE DEFENDANT: Yes. [¶] THE COURT [to counsel]: Mr. Sharkey, have you thoroughly reviewed with your client his constitutional rights with respect to this issue and satisfied yourself that your client fully understands the giving up of those rights? [¶] MR. SHARKEY: Yes, Your Honor. [¶] THE COURT: And are you also satisfied that his decision to do so is knowing, intelligent and voluntary? [¶] MR. SHARKEY: I am, Your Honor. [¶] THE COURT: Do you concur in the decision? [¶] MR. SHARKEY: I do, Your Honor. [¶] THE COURT: Mr. Rogers, I asked your attorney if your decision was knowing, intelligent and voluntary and he believes that it is and I want to follow up with you just a moment. [¶] What I want to know, if anyone has made any kind of promise, threat, inducement or in other words offered you anything at all in order to get

you to make this decision? [¶] THE DEFENDANT: No. [¶] THE COURT: You are doing this freely and voluntarily of your own free will? [¶] THE DEFENDANT: Yes." ~(2 RT 122)~ After confirming that the prosecution also waived jury trial, the court continued the matter for nonjury trial.

Defendant cites *People v. Wrest* (1992) 3 Cal.4th 1088, 1105 (*Wrest*), where the court held a jury waiver advisement sufficient because the record disclosed that "a complete description of the essential elements of jury trial" was conveyed to the defendant and that he expressly affirmed his "understanding of those elements." Defendant notes that the advisement there included the statement that "[a]ll 12 citizens would have to agree that you were guilty in order to be convicted [*sic*] of any charge against you. And all 12 citizens would have to agree that you are not guilty in order to acquit you." (*Id.* at pp. 1103-1104.) The apparent implication of defendant's argument is that unanimity is one of the "essential requirements of jury trial," an understanding of which must appear on the record. Such a reading would mean that the court had, in *Wrest*, overruled *Tijerina* by implication. We will not lightly adopt such a view, particularly since there is no indication that the court even considered the issue in *Wrest*. The only question there was whether the admonitions actually given were *sufficient* to satisfy constitutional standards. The court had no occasion, and did not purport, to decide which of those admonitions were constitutionally *necessary*. In *Tijerina* it squarely rejected a contention that the defendant must be advised of the unanimity requirement. We are not free to depart from that holding. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

B. Relief from Waiver

Defendant also contends that the court erred by failing to delve into his reasons when, at the continued trial some six weeks after the proceedings just described, he sought to be relieved of his waiver and to proceed with a jury trial. The relevant events appear as follows in the transcript: When the court called the matter, defense counsel

asked, apparently of defendant, "Do you want to ask her [i.e., the judge] about that?" Counsel then said to the court, "Mr. Rogers would like to address the Court regarding the jury trial waiver." ~(2 RT 128)~ The court demurred, saying, "Counsel, I will hear from you in this regard. Mr. Rogers is more than competently represented in this matter." The following then occurred: "MR. SHARKEY: Mr. Rogers is requesting a jury trial at this time. [¶] THE COURT: All right. And the grounds for that request? He had previously waived his right to jury trial. [¶] MR. SHARKEY: Mr. Rogers has changed his mind and he would like to have his case tried before a jury rather than a court. [¶] THE COURT: Counsel, when we were here last in court, it was for purposes of beginning the jury trial in this matter. In fact, this Court had summoned 120 prospective jurors who were to participate in the jury selection process on that same date. Before that process could commence, I was informed by both counsel that each had agreed to engage in trial by court rather than trial by jury. [¶] . . . . [A]t that time I conducted a very direct and clear inquiry of you personally, Mr. Rogers. [¶] I explained to you at that time that you had the right to have a trial by jury . . . . [¶] You indicated a full understanding of those things, your attorney indicated to me that he had discussed the matter with you and that he was satisfied that you fully understood those things and you then voluntarily gave up your right to have a trial by jury. [¶] In addition, I asked you very clearly and specifically if anyone had made any kind of threat, promise, inducement or had attempted to coerce you in any way into giving up those rights and you indicated that they had not. And I asked you if your decision was made freely and voluntarily on your part and you indicated that it was. [¶] And, sir, I am completely satisfied that you made a knowing and intelligent waiver of your right to have a tr[ia]l by jury on all issues in this case, and for that reason we will now proceed with trial by court. [¶] Anything further, counsel?"

As this point the prosecutor offered the observation that he had been prepared to go forward on the original trial date but that the defense had "wanted the case continued" until after the electorate had voted on Proposition 66, passage of which might have

"alter[ed] the outcome for [defendant] in this case." This led to a digression concerning whether the delay afforded by the jury waiver had served as "consideration" for that waiver. After an unrecorded conference in chambers, the prosecutor proclaimed for the record that "there was no consideration in exchange for the defendant waiving his right to jury trial . . . ." Defense counsel confirmed that it was "not the case" that the court had "agreed to a continuance in this case in exchange for the waiver of jury trial." "Mr. Rogers," he went on, "received no promises that the case was going to be continued if he waived jury."

Defendant asserts that the court erred because it "made no inquiry about the circumstances which had caused him to 'change his mind.' The court did not allow appellant to speak as he had requested to do, but required counsel to make the entire argument." In addition, defendant contends, the court neglected to inquire into the factors that have been held relevant to a decision whether to relieve a defendant of a jury waiver, and did not exhibit an awareness that anything other than the validity of the waiver was relevant. Citing authorities regarding trial court discretion, defendant contends that the court below abused its discretion because it failed to "consider all factors necessary to bring about a just result."

Defendant's argument depends on two false premises, one factual and the other legal. The false factual premise is that the trial court "fail[ed] to make any inquiry into what might be motivating the request" for relief from the waiver. In fact the court inquired of counsel what were the grounds for the request, and counsel replied that defendant had changed his mind. If that was an inaccurate or inadequate account of "what might be motivating the request," the fault lies with counsel, and the remedy lies in a proceeding challenging the effectiveness of his representation of defendant. But it is at this point that defendant seeks to shift the weight of his argument to his false legal premise, which is that the trial court had a duty to plumb beneath counsel's admittedly uninformative statement to determine whether the request was actually supported by

good cause, which counsel had failed or neglected to disclose. We know of no authority placing such a duty on the court, and defendant offers none. Had defendant expressed dissatisfaction with counsel, a duty of judicial inquiry would of course have been triggered. (See *People v. Marsden* (1970) 2 Cal.3d 118.) But no such duty arises merely because a defendant wishes to obtain relief for which his attorney fails to articulate any legal justification. Unless and until counsel's effectiveness is put in issue, the court is entitled to assume, as the court explicitly did here, that counsel is in fact presenting the defendant's case as well as it can be presented.

There is no suggestion that defendant actually had legal cause for relief from his waiver. If such cause existed, the remedy lies in a proceeding that would permit the defendant to establish that cause by introducing extrinsic evidence. Again, its relevance would seemingly be to establish that counsel rendered ineffective assistance, not that the court erred in failing to conduct further inquiry.

Defendant asserts that the court abused its discretion by failing to establish on the record that it weighed the factors bearing on the appropriateness of granting defendant's request. We know of no authority placing such a burden on the court. "It is well established that a waiver of a jury trial, voluntarily and regularly made, cannot afterward be withdrawn except in the discretion of the court. [Citations.] *Absent special circumstances the court may deny a motion* to withdraw such a waiver especially where adverse consequences will flow from the defendant's change of mind. In exercising its discretion the court may consider such matters as the timeliness of the motion to withdraw the waiver, the reason for the requested withdrawal and the possibility that undue delay of the trial or inconvenience to witnesses would result from granting the motion." (*People v. Chambers* (1972) 7 Cal.3d 666, 670-671, italics added.)

This language indicates that (1) the burden of justifying a withdrawal rests on the defendant; (2) at least in the absence of "special circumstances," an untimely motion can be denied for that reason alone; and (3) an abuse of discretion is unlikely to be found

where granting the request would produce undue delay or inconvenience. The order challenged here can be sustained on either of the first two points without more. However, defendant cites *People v. Osmon* (1961) 195 Cal.App.2d 151 (*Osmon*), for its suggestion that a defendant may be entitled to withdraw a jury waiver if the request is " 'made sufficiently in advance of trial so as not to interfere with the orderly administration of the business of the court or to result in unnecessary delay or inconvenience to witnesses or to the prejudice of the other party to the action . . . .' " (*Id.* at p. 154, quoting *People v. Melton* (1954) 125 Cal.App.2d Supp. 901, 904.) There the trial court was held to have abused its discretion because the request was made a week before the scheduled trial date and 10 days before the matter was actually transferred to the trial judge—plenty of time to avert any apparent harm. (*Osmon*, *supra*, 195 Cal.App.2d at pp. 154-155.) Here of course the request was not made "in advance of trial" at all, but at the very time appointed for trial.

Moreover, the record supports a finding, which we will infer in support of the court's ruling, that granting the request would have interfered with the orderly administration of the business of the court. The record does not show how much time would have been lost in summoning prospective jurors to the courtroom, but it clearly establishes substantial inconvenience to witnesses. First it appears that a number of them were already on hand to testify, as reflected in the fact that seven of them *did* testify before the noon recess. Ultimately 24 witnesses would testify over two days. At a minimum, granting defendant's belated request would have required sending a number of those witnesses away while a jury was selected—a process that might take days given the number of witnesses and potential grounds for juror disqualification.

In any event, contrary to defendant's suggestion, the trial court did not have to enumerate all these considerations on the record to establish a sustainable exercise of discretion. In the absence of a prescriptive rule demanding such an on-the-record recitation, the court's ruling will be presumed correct and findings will be inferred in its

support insofar as the record contains substantial evidence to support them. (See *People v. Wiley* (1995) 9 Cal.4th 580, 592 [invoking presumption of correctness of judgments in support of inferred finding that prior convictions met criteria for sentence enhancement sustained by trial court].) Here the record amply demonstrates that granting defendant's request would have disrupted the orderly administration of justice and inconvenienced the witnesses and other participants in the trial. The record fails to suggest any justification for the belated request. Under these circumstances, nothing approaching an abuse of discretion can appear.

III. *Multiple Five-Year Enhancements*

The trial court sentenced defendant to an indeterminate term of 50 years to life, consecutive to a determinate term of 25 years. The indeterminate term was based on consecutive three-strikes sentences of 25 years to life on each of the two counts. The determinate term consisted of two five-year enhancements under Penal Code section 667, subdivision (a) (§ 667(a)), on each of the two counts, plus one five-year enhancement under Penal Code section 667.5, subdivision (b). The court also imposed, but stayed, one or more one-year enhancements under Penal Code section 667.5, subdivision (a).[2]

Defendant contends that the court erred by imposing the section 667(a) enhancements twice, i.e., once on each count. Defendant asserts that under *People v. Tassell* (1984) 36 Cal.3d 77, 90 (*Tassell*), overruled on other grounds in *People v. Ewoldt, supra*, 7 Cal.4th at pages 386-387, enhancements for prior convictions can only be imposed once. Defendant acknowledges one case that may appear to reject this principle in a three-strikes setting, but he urges us to hold that case distinguishable.

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[2] The record does not clearly disclose the number of stayed enhancements, a question not material to this appeal. We also note that the abstract of judgment misstates the statutory basis for the stayed enhancements as "PC667(a)," when in fact it is Penal Code section 667.5, subdivision (a).

(*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1380.) The validity and application of that decision is immaterial here, however, because the California Supreme Court itself appears to have squarely rejected defendant's argument in *People v. Williams* (2004) 34 Cal.4th 397, 405 (*Williams*), a case not cited by either party.[3] The defendant there, a third-striker, was convicted of three sex offenses in one case, and burglary and auto theft in another. In both cases he was found to have suffered two prior convictions, each supporting a five-year enhancement under Penal Code section 667, subdivision (a)(1). Pronouncing sentence in both cases, the trial court imposed (1) on the burglary charge, "a term of 25 years to life . . . plus an additional five-year term for each of the prior serious felony convictions, for an aggregate sentence of 35 years to life," and (2) on the sex offenses, a consecutive 25-to-life sentence "plus five years for each of the two prior serious felony convictions . . . ." (*Id.* at pp. 400-401.) The court referred to the result as "an overall net sentence of 70 years to life" (*id.* at p. 401, fn. omitted), while acknowledging that it actually "consisted of a determinate term of 20 years to be followed by two consecutive indeterminate life sentences, each having a minimum term of 25 years" (*id.* at p. 401, fn. 3).

The court held that in a third-strike context, "a prior conviction enhancement may be added to the third strike sentence for each new offense." (*Williams, supra,* 34 Cal.4th at p. 400.) It acknowledged the holding in *Tassell, supra,* (1984) 36 Cal.3d 77, but concluded that it was "not controlling or even helpful" in a third-strike context. (*Williams, supra,* 34 Cal.4th at p. 402; see 400 ["not controlling"].) The imposition of multiple enhancements for the same prior offense, the court held, is "not inconsistent" with the voter's intent in enacting section 667(a), which was " 'to increase sentences for recidivist offenders.' " (*Williams, supra*, 34 Cal.4th at p. 404, quoting *People v. Jones*

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[3] Indeed, respondent does not address the alleged sentencing error at all.

(1993) 5 Cal.4th 1142, 1147.) Moreover it was "consistent with the logic of the Three Strikes law," which "uses a defendant's status as a recidivist to separately increase the punishment for each new felony conviction." (*Williams, supra,* 34 Cal.4th at p. 404.)

This reasoning appears to boil down to the proposition that the compound ratcheting up of sentences based upon a single fact (a single prior conviction) is consistent with the voters' manifest and seemingly insatiable appetite for ever-greater punishment.[4] This is certainly true, as far as it goes, but the better traditions of our jurisprudence have never justified courts in running ahead of the worst impulses of the day, like foxes before the hounds. Instead we have supposed that ambiguities in criminal statutes, and particularly ambiguities about the punishment to be imposed, will be resolved in favor of the accused. Nothing in the "Three Strikes" law, or anywhere else in the Penal Code, plainly commands the imposition of duplicate enhancements for a single prior offense. In the absence of such a plain command, some might suppose such a punishment to be unauthorized. The Supreme Court has spoken, however, and we are powerless to diverge from its conclusion. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

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[4] Of course, at some point the notion of "increased punishment" becomes theoretical to the point of absurdity, and threatens to bring the kind of discredit upon our times that the burning of witches brought upon earlier ones. Nonetheless, once the constitutionality of a statute is established, the function of the judge is to execute its terms. As Holmes wrote, "[I]f my fellow citizens want to go to Hell I will help them. It's my job." (O. W. Holmes, letter of March 4, 1920, to Harold J. Laski, published in 1 Howe, ed., Holmes-Laski Letters (1953), p. 249, as quoted at <http://www.bartleby.com/73/327.html> (as of Aug. 28, 2006).)

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.